



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: J. MOHAMMED, J.A.)**

**CIVIL APPEAL (APPLICATION) NO. 540 OF 2019**

**BETWEEN**

**PONANGIPALLI VENKATA RAMANA RAO..1<sup>ST</sup> APPLICANT**

**KOLLURI VENKATA SUBBARAYA KAMASASTRY (T/A**

**TACT CONSULTANCY SERVICES).....2<sup>ND</sup> APPLICANT**

**VERSUS**

**DIPIT PREMCHAND CHHEDA.....1<sup>ST</sup> RESPONDENT**

**NIKUNJ PREMCHAND CHHEDA.....2<sup>ND</sup> RESPONDENT**

**CONFEC INDUSTRIES E.A. LIMITED.....3<sup>RD</sup> RESPONDENT**

(Being an application for extension of time to file a record of appeal out of time from the Judgment of the High Court of Kenya at Nairobi (P. J. O. Otieno, J.) delivered on 7th September 2018 *in H.C.C. Case No. 126 of 2013.*)

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**RULING**

**Background**

[1] This is an application brought under **rules 4 and 82** of this Court's Rules and all other enabling provisions of the law. The applicants seek an extension of time to file a record of appeal from the Judgment of the High Court of Kenya at Nairobi (**P. J. O. Otieno, J.**) delivered on 7th September, 2018.

[2] The application is premised on the grounds that the applicants were dissatisfied with the impugned judgment which was made in favour of the respondents and lodged a notice of appeal on 14th September 2018; the proceedings were finalised by the Court Registry on 2nd September, 2019 and the record of appeal ought to have been filed by 2nd November, 2019; that due to an administrative error the applicants' advocate was informed of the collection of the proceedings on 9th September, 2019 though they were collected on 3rd September, 2019.

[3] It was counsel's further contention that the delay in filing the record of appeal was due to the transition of advocates and administrative errors; that the applicants have since deposited the decretal sums in a joint account as security and thus the respondents will not suffer any prejudice; that the applicants should not suffer any prejudice; and that it is in the interests of justice that the applicants be granted leave to appeal the judgment and that the record of appeal be allowed as duly filed. The application is supported by the affidavit of the applicants' advocate, **Oketch Brian**, in which he reiterated the grounds on the face of the application.

[4] The respondents' advocate, **Hillary Mecheo Orina**, filed a replying affidavit on 5th February, 2020 stating that the first time the applicants made an application seeking typed proceedings was on 28th January, 2019 not 14th September, 2018 as alleged; that the Registrar of the High Court issued a Certificate of Delay on 27th September, 2019 on the basis of the application of 28th January, 2019; that in computation of time to lodge the appeal, the Registrar excluded the period of 217 days from 28th January, 2019 when the application for typed proceedings was received to 2nd September, 2019 when the proceedings were ready for collection; and that even if the applicants

proved that the alleged letter purported to have been filed on 14th September, 2018 was genuinely filed, the same was never served on the respondent's advocates as required by the mandatory provisions of **Rule 82 of this Court's rules**.

[5] It was counsel's further submission that the applicants have not laid the basis of the delay as required; that the letter alleged to have been lodged in Court on 14th September, 2018 has not been included in the record of appeal which renders the record incurably defective and incompetent; that on 28th January, 2019, the appellants had lodged in the High Court an application seeking, *inter alia*, leave to lodge the appeal herein out of time but there was no mention of any letter bespeaking the proceedings having been filed on 14th September 2018.

[6] In response, the applicants' advocate filed a replying affidavit on 13th January, 2020 stating that the letter of request for proceedings was filed (on 14th September, 2018) within 30 days of the impugned judgement through the applicants' former advocates on record, **Adera and Company Advocates**; that the proceedings were completed on 2nd September, 2019; and that due to transition of advocates, the letter bespeaking proceedings by **Mwaura and Wachira Advocates** and the subsequent application to file an appeal out of time were inadvertently made without confirmation that the previous advocates duly requested for the proceedings within the prescribed time.

#### **Determination**

[7] I have considered the application, the grounds in support thereof, the rival affidavits and the law. The discretion that I am called to exercise in the determination of this application is provided under **Rule 4 of the Court of Appeal Rules** which provides thus:

**“The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”**

[8] This Court in **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231** set out the parameters that must be established in such an application as follows:

**“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”** [Emphasis supplied]

[9] These factors are discretionary and non-exhaustive. Other factors that the court can take into consideration were set out in the case of **Fakir Mohammed v. Joseph Mugambi & 2 others (2005) eKLR** where it was held that;

**“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor.”** [Emphasis supplied].

[10] Further, in **Muringa Company Ltd vs Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019** this Court held that:

**“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”**  
[Emphasis supplied]

[11] The issue for determination is whether the application is merited in view of the principles set out in the cases cited above. As regards the delay, this Court in **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** put it aptly that:-

**“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”**

[12] Rule 82 of the Court of Appeal Rules provides as follows:-

**“(1) Subject to Rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-**

- i. a memorandum of appeal, in quadruplicate
- ii. the record of appeal, in quadruplicate
- iii. the prescribed fee, and
- iv. security for the costs of the appeal:

**Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”**

[13] The import of the above is that a record of appeal should be filed within 60 days of the lodging of the notice of appeal. Nevertheless, where a party makes an application for typed proceedings, the time taken by the court to assemble the proceedings is exempted in the computation of the 60 days. Subsequently, the Deputy Registrar of the relevant Court issues a certificate of delay for verification of the period to be excluded by the court and the parties.

[14] It is evident from the record that the applicants’ previous advocates, **Adera & Company Advocates**, lodged a notice of appeal on **14<sup>th</sup> September, 2018**. The same firm issued a letter bespeaking proceedings to the Deputy Registrar of the High Court at Nairobi on **14<sup>th</sup> September, 2018**. Although the said letter indicates that the respondents’ advocates were copied, the respondents’ advocates claim that they were not served as required.

[15] The failure to serve the letter bespeaking proceedings of **14<sup>th</sup> September 2018** is a mistake of the applicant’s previous advocates. In finding that the delay caused by administrative lapses in the process of change of advocates is a sufficient explanation of delay, this Court in **Njeri Njoroge v Joseph Maina Gichuhi & another [2018] eKLR, Civil Application No. 139 of 2018** stated:-

**“It is a constitutional imperative and a rule of natural justice that each person has a right to legal representation and counsel of his/her choice. Founded on this constitutional underpinning, I find the explanation by the applicant that the delay of 45 days was due to her instructing another counsel a sufficient explanation. I am persuaded by dicta in *Richard Velji Shah & 3 Others vs. Victor Maina Ngunjiri ELC 359/200* where it was expressed delay caused by administrative lapses in the process of change of advocates is a sufficient explanation of delay. In this matter, I note there is no affidavit by the new advocate on record explaining the delay between 14<sup>th</sup> April 2018 and 11<sup>th</sup> May 2018 when the instant application was filed. However, given the sufficient explanation and taking into account the period of delay is about 45 days, I find the delay is not inordinate.”**

[16] I therefore find that the failure to serve the letter of request for proceedings of **14<sup>th</sup> September 2014** can be excused in the interests of substantive justice. In **Aron Kibiwot Chepsiror v Florence Chemonges [2018] eKLR Civil Appeal (Application) No. 66 of 2017**, this Court dealt with similar circumstances where the copy of a letter requesting for the proceedings was not served on the other party. It was held that:-

**“The omission to serve the copy of the letter is not a substantial breach of the rule and is a mere procedural technicality which under Article 159 (2) (d) of the Constitution does not make the appeal fatally defective or prevent the court from administering substantial justice.”**

See also **Kenya Human Rights Commission v Nubian Rights Forum & 17 others [2020] eKLR, Civil Application No. 180 of 2020**.

[17] The respondents further claim that it was not the letter of request of proceedings **14<sup>th</sup> September 2018** that formed the basis of the Certificate of Delay but the letter of **28<sup>th</sup> January 2019**. The applicants’ counsel explained that the letter of **28<sup>th</sup> January 2019** and the subsequent application to file an appeal out of time were inadvertently made. In addition, the appellants’ counsel stated that they withdrew the said application once it was confirmed that the previous advocates requested for the proceedings on time through the letter bespeaking proceedings of **14<sup>th</sup> September 2018**.

[18] The Certificate of Delay issued by the Deputy Registrar on 27<sup>th</sup> September 2018 states that a period of 217 days was taken to compile the proceedings from **28<sup>th</sup> January 2019** to **2<sup>nd</sup> September 2019**. From the record, the proceedings were ready on **2<sup>nd</sup> September 2019** and the record of appeal ought to have been filed on or before **2<sup>nd</sup> November 2019** but was filed on **8<sup>th</sup> November 2019**.

[19] I find that the period of delay in filing the record was not inordinate and is well explained. The applicants’ counsel freely admitted that the delay in filing the record of appeal was due to an administrative error which caused him to miscalculate the time when the appeal was due for filing. In **Belinda Murai & 9 Others v Amos Wainaina [1978] eKLR Law, J.A.** held that **“mistakes of a legal counsel may amount to sufficient cause for purposes of an application for extension of time to file a Notice of Appeal.”**

[20] As regards the chances of success of the intended appeal, I have perused the impugned judgment and the draft memorandum of appeal which claims, among others, that the learned Judge erred in law and fact by failing to appreciate that after the applicants paid a deposit, the

subsequent negotiations could not have extinguished the contract as the issue of price was never discussed further since the parties had already agreed on the terms. Without going into the merits of the appeal as this will be determined by the full bench which will be seized of the appeal, I am satisfied that the intended appeal is arguable and not frivolous.

[21] In **Muchugi Kiragu v James Muchugi Kiragu & another Civil Application No. Nai. 356 of 1996**, this Court had the following to say as regards this Court's discretion under **Rule 4**:

**“Lastly, we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”**

[Emphasis supplied].

[22] On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicants, in denying them an extension, against the prejudice to the respondents in granting an extension. The applicants were aggrieved by the judgment of the High Court and are desirous of appealing against the said judgment out of time. On the other hand, the respondent filed a replying affidavit opposing the application for extension of time. From the record, the applicants have since deposited the decretal sums in a joint account as security. Hence, in my considered view, the respondents will not suffer substantial prejudice if this application is allowed.

[23] From the circumstances of the application before me, the applicants have demonstrated the existence of the parameters set out in **Leo Sila Mutiso** (supra). Accordingly, I exercise my discretion and allow the Notice of Motion dated 9th January, 2020. The record of appeal filed on 8th November, 2019 be and is hereby deemed as duly filed. Costs of this application to the respondents.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of February, 2021.**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**